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No. 82-265

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALEX J. RAINERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether trial began within the time limits set by the Speedy Trial Act.

2. Whether the district court properly denied petitioner's motion to transfer trial to another location within the same judicial district.

3. Whether the jury selection plan in effect in the Western District of Wisconsin at the time of petitioner's trial complied with the Jury Selection and Service Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A(1)) is reported at 670 F.2d 702. The order of the district court denying petitioner's motion for a transfer (Pet. App. A) is reported at 521 F. Supp. 30.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1982. A petition for rehearing was denied on March 24, 1982. On May 24, 1982 Justice Stevens granted an extention of time for filing a petition for a writ of certiorari to June 9, 1982. The petition was filed as of June 10, 1982, on August 16, 1982, and is therefore out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted of causing travel in interstate commerce and use of an interstate facility to promote a business enterprise involving prostitution, in violation of 18 U.S.C. 1952 and 2 (Counts 1-3); knowingly making false and material declarations before a federal grand jury, in violation of 18 U.S.C. 1623 (Count 4); and obstructing the administration of justice by having a prospective grand jury witness threatened, in violation of 18 U.S.C. 1503 (Count 5). He was sentenced to a $5000 fine on each of Counts 1-3, one year's imprisonment on Count 4, and two years' imprisonment on Count 5, the prison terms to run consecutively. The court of appeals affirmed (Pet. App. A(1)).

The evidence at trial showed that from late 1976 until early 1979, petitioner and one Cira Gasbarri split the proceeds of a prostitution business at the "Showbar" in Hurley, Wisconsin (Pet. App. A(1), at 23-24). In addition, petitioner assisted Gasbarri in managing the bar by reviewing financial records and hiring employees (*ibid.*).

In furtherance of the prostitution business, petitioner caused checks drawn on a Michigan bank account to be given to a prostitute at the Showbar, and to a Wisconsin power company in payment for the Showbar's electricity (*id.* at 25-26). Petitioner also caused the interstate delivery of linens for the prostitution business from a linen supply company in Minnesota to the Showbar in Wisconsin (*id.* at 26). Evidence at trial also showed that petitioner had threatened a grand jury witness and had falsely stated to the grand jury that he had not travelled to and from Reno, Nevada with Gasbarri (*id.* at 27-29).

2. Before trial petitioner moved, pursuant to Fed. R. Crim. P. 18, to transfer the trial from Madison, Wisconsin to either Hurley or Superior, two other cities (like Madison) within the Western District of Wisconsin. The district court denied the motion, agreeing with the magistrate's conclusion that a transfer would result in a greater inconvenience since, although petitioner and a number of witnesses lived in Hurley, there was no federal courthouse there; and the former federal courthouse at Superior — 167 miles from Hurley — had been dismantled (Pet. App. A).

The district court also adopted the magistrate's recommendation to deny petitioner's claim that the district court's jury selection plan violated the Jury Selection and Service Act, 28 U.S.C. (& Supp. IV) 1861 *et seq.* By statute, court may be held at five places within the Western District of Wisconsin: Eau Claire, La Crosse, Madison, Superior, and Wausau. 28 U.S.C. 130(b). The jury selection plan divided the district into five "divisions" surrounding those cities.[1] Although when the plan was adopted in 1972 some trials were held in each of the "divisions," the district court quarters in La Crosse, Superior, and Wausau were closed several years later (Pet. App. F). As a result, citizens of those "divisions" were not called to serve on petit juries (*ibid.*).[2] Petitioner claimed that the application of the plan thus contravened the Jury Selection and Service Act, which declares a

> policy * * * that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit

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[1]There are no statutory divisions within the Western District of Wisconsin. 28 U.S.C. 130(b). The "divisions" for purposes of jury selection were the counties surrounding the places where court was authorized to be held. See 28 U.S.C. 1869(e)(7).

[2]Grand jurors, by contrast, were called from the entire district, and residents of the La Crosse, Superior, and Wausau "divisions" could be called to serve on grand juries (Pet. App. F; see also Pet. App. D, paras. 14, 15).

> juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States * * *.

28 U.S.C. 1861. The magistrate concluded that, since petitioner was properly tried in the Madison "division" and his jury was drawn according to the plan from that "division," the jury selection complied with the Act (Pet. App. A).

3. The court of appeals affirmed petitioner's conviction. With regard to the location of trial, it concluded that venue in Madison complied with Fed. R. Crim. P. 18 because the lack of court facilities in the locations proposed by petitioner would impede the "prompt administration of justice." Pet. App. A(1), at 3. The court also rejected petitioner's jury selection claim. It questioned whether "Congress intended that a litigant whose jury was * * * properly selected from a division of a district could challenge the particular type of defect alleged here, involving * * * interests of citizens [in other divisions] in an opportunity to be considered for service" (Pet. App. A(1), at 6). In any event the court concluded that petitioner had not preserved his claim by a motion to stay proceedings filed in conformity with 28 U.S.C. 1867(d) (Pet. App. A(1), at 5). The court also rejected petitioner's claim that delay in the commencement of his trial had violated the Speedy Trial Act, 18 U.S.C. (& Supp. IV) 3161 *et seq.* (Pet. App. A(1), at 6-7).

ARGUMENT

1. Petitioner argues that the commencement of trial on November 24, 1980, more than five months after his June 23, 1980 arraignment, violated the Speedy Trial Act, 18 U.S.C. (& Supp. IV) 3161 *et seq.*, which requires that trial begin within 70 days of arraignment. 18 U.S.C. (Supp. IV) 3161(c)(1). The Act excludes from the 70 day limit,

however, delay attributable to the filing and consideration of pretrial motions. 18 U.S.C. (Supp. IV) 3161(h)(1)(F), (J). Between June 23 and July 28, petitioner filed a total of 20 motions and a supporting affidavit; the government responded to the last of these on August 1, 1980. The court of appeals thus properly excluded the period between June 23 and August 1 under 18 U.S.C. (Supp. IV) 3161(h)(1)(F) ("delay resulting from any pretrial motion * * *"). (Pet. App. A(1), at 6-7.) The magistrate decided or made recommendations on these various motions on October 3, 7, 10, 15, and 28. The court of appeals properly excluded 30 days of the period between August 1 and October 28 under 18 U.S.C. (Supp. IV) 3161(h)(1)(J) ("delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court"). (Pet. App. A(1), at 7.) On October 7, 1980, petitioner filed another motion to dismiss, which was denied on November 10, 1980. The court of appeals again excluded 30 days of that period under 18 U.S.C. (Supp. IV) 3161(h)(1)(F), (J). (Pet. App. A(1), at 7.) Given the properly excludable time, only 55 includable days elapsed between petitioner's arraignment and his indictment.

Petitioner argues that a different result is required because the magistrate originally directed that trial should begin on August 29, 1980 (Pet. 7-10). Given petitioner's intervening motions, however, the district court was in no way bound — and was certainly not required by the Speedy Trial Act — to adhere to that date.[3]

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[3]The magistrate's order stated that the August 29 deadline would not be extended absent a finding "that the ends of justice served by such continuance outweigh the best interests of the public and the defendant in a speedy trial." It is true, as petitioner emphasizes (Pet. 9), that that language parallels the language in 18 U.S.C. 3161(h)(8)(A), which permits exclusion of time resulting from a continuance only if the court sets forth the reasons justifying the continuance. But Section 3161(h)(8)(A) supplements, rather than overrides, the automatic exclusions provided in Section 3161(h)(1).

2. Petitioner's claim (Pet. 10-18) that the failure to transfer his trial from Madison to Superior violated Fed. R. Crim. P. 18 is frivolous. The former federal court facility in that city — 167 miles from Hurley — has been closed, the library and courtroom furniture have been removed, and the building has been declared surplus property (Pet. App. A). 28 U.S.C. (Supp. IV) 142 provides that "Court shall be held only at places where Federal quarters and accommodations are available, or suitable quarters and accommodations are furnished without cost to the United States." [4]

3. Petitioner also contends that the district court's jury selection plan no longer complies with the Jury Selection and Service Act[5] because citizens in three of the five "divisions" created by the plan are not considered for petit jury service. As an initial matter, it is by no means clear that petitioner is entitled under the Act to object to this perceived deficiency in the district's jury selection plan. The declaration of policy in 28 U.S.C. 1861, upon which petitioner relies, declares that a litigant should be entitled to a jury drawn from "the district or division wherein the court convenes." Section 1869(e) defines "division" to mean, "in judicial districts where there are no statutory divisions,

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[4]The absence of court facilities in the city favored by petitioner makes this case obviously different from those on which he relies. See *United States* v. *Burns*, 662 F.2d 1378 (11th Cir. 1981); *United States* v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973); *DuPoint* v. *United States*, 388 F.2d 39 (5th Cir. 1967).

[5]Petitioner also hints that the operation of the plan somehow violated his constitutional right to an impartial jury (Pet. i, 19). He does not argue this claim, nor did he in the court of appeals (Pet. App. A(1) at 5). In any event, petitioner made no showing that "a 'distinctive' group in the community" was excluded from the jury. *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979). The Constitution guarantees only that jurors will be drawn from the state and district where the crime was committed, not from particular counties within the district. United States Constitution, Article III, Section 2, Clause 3; Sixth Amendment.

such counties * * * surrounding the places where court is held as the district court plan shall determine * * *." Petitioner was properly tried in the Madison "division" [6] established by the district court's plan, and his jury was drawn from that "division."

In any event the plan of which petitioner complains has been amended, and now provides that citizens residing in the La Crosse, Superior, and Wausau "divisions" will be called to serve on petit juries in the Eau Claire "division." [7] Thus, to the extent that petitioner seeks to vindicate "the opportunity [for all citizens] to be considered for service on * * * petit juries in the district courts of the United States" (28 U.S.C. 1861), his efforts are now unnecessary. Moreover, even if petitioner were to be retried under the amended jury selection plan, his trial could again take place in Madison, and his jury would be drawn from that "division." Under these circumstances, review of the issue is unwarranted.

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[6] Not only would trial in Superior have been impossible, but petitioner's perjury (Count 4) took place before a grand jury in Madison. See Pet. App. A.

[7] The order amending the plan is reproduced as an appendix to this brief. We are informed that the amendment was approved by the Seventh Circuit judicial council on April 26, 1982.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1982

DOJ-1982-10

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MAR 16 1982

IN THE MATTER OF THE PLAN OF THIS COURT FOR RANDOM JURY SELECTION	ORDER

IT IS HEREBY ORDERED that the plan of this court for the random selection of grand and petit jurors is amended by deleting the first sentence of Section 14, and by replacing it with the following paragraph:

Persons whose names were selected pursuant to Section 13 of this plan from the qualified wheel of the Madison Division shall be called to appear as prospective jurors for all jury trials held in the Madison Division. Similarly for jury trials in the La Crosse, Superior and Wausau Divisions, prospective jurors shall be selected from the La Crosse, Superior and Wausau qualified wheels respectively. For jury trials in the Eau Claire Division the panel shall include persons whose names were selected from the Eau Claire, La Crosse, Superior and Wausau qualified wheels; the number of discs drawn from the qualified jury wheel for each of these four divisions shall be as near as possible in the proportion which the number of names on the current source lists for that division bears to the total number of

names on the current source lists for these four divisions. Whenever a jury trial is held in either the La Crosse, Superior or Wausau Division, then for a period of six months starting one month after such trial jurors from that division shall not be used for jury trials in the Eau Claire Division.

This amendment shall become effective after approval by the judicial council of the Seventh Circuit.

Entered at Madison, Wisconsin this 16th day of March, 1982.

BY THE COURT:

Barbara B. Crabb
Chief Judge